UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

NATIONAL NURSES ORGANIZING
COMMITTEE-TEXAS/NNU,
Respondent,

and Case 16-CB-225123

ESTHER MARISSA ZAMORA,
Employee-Charging Party.

CHARGING PARTY'S EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION

Pursuant to NLRB Rules & Regulations Section 102.46, Charging Party Esther Marissa Zamora, by and through her undersigned attorneys, files the following exceptions to the Administrative Law Judge's June 24, 2020 Decision.[1]

1. The ALJ erred in failing to find violations on the primary allegations of the Complaint concerning the Respondent's failure to give the requested information to the Charging Party and the Respondent's bad faith in the perfunctory, coy, and knowingly misleading manner in which it responded to the Charging Party's information request. (ALJD 1-27).

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[1] For purposes of this Exceptions document and the accompanying Brief in Support, "ALJD" refers to the Administrative Law Judge's June 24, 2020 Decision, with page and line references set out as, *e.g.*, ALJD 5:4-8. "TR" refers to the transcript of the Feb. 4-5, 2020 ALJ hearing, with page and line references set out as, *e.g.*, TR 5:4-8. "GC Ex. __" refers to General Counsel exhibits admitted in the ALJ hearing. "Jt. Ex. __" refers to Joint Exhibits admitted in the ALJ hearing.

2. The ALJ erred in finding that the "evidence fails to establish that any term or condition of employment of bargaining unit employees was determined, controlled, or affected by any agreement entered into by the Respondent other than the collective bargaining agreement between the Respondent and the Employer, together with the 'side letters' and memorandum of understanding it references." (ALJD 1).

3. The ALJ erred in finding that "[t]he record further fails to establish that any other agreement or document related to, affected, or was affected by the Respondent's exercise of its authority and/or discharge of its duties as the employees' exclusive bargaining representative." (ALJD 1).

4. The ALJ erred in finding that "[t]he Respondent's refusal to provide to a bargaining unit employee a copy of another document, not shown to relate to terms and conditions of employment or its responsibilities as the exclusive bargaining representative, did not violate Section 8(b)(1)(A) of the Act." (ALJD 1).

5. The ALJ erred in refusing to rule on the Charging Party's Motion to Strike Portions of the Union's Answer and Affirmative Defenses, concluding that such a ruling was unnecessary because the Complaint against the Respondent should be dismissed and that granting or denying the Charging Party's motion would not affect the outcome of the case. (ALJD 2:38-44).

6. The ALJ erred in describing the General Counsel's amendment to Complaint Paragraph 8(b) as stating: "(b) On or about July 25, 2018, Respondent, by its agent Bradley Van Waus, responded to the Charging Party's **July 22, 3028** [sic] request in a manner that was arbitrary and/or in bad faith." (ALJD 4:6-9 (emphasis added)).

(The General Counsel's amendment actually states: "On or about July 25th, 2018, Respondent, by its Agent, Bradley Van Waus, responded to the Charging Party's July 11th, 2018 request for information, in a manner that was arbitrary and/or in bad faith." (TR 222:24 to 223:3.)

7. The ALJ erred in finding that:

> [T]he record fails to establish that Respondent had any kind of neutrality agreement with the Employer, and I conclude that it did not. Rather, I find that the Respondent, or a union affiliated with the Respondent, had entered into a 'neutrality agreement' with HCA Holdings, Inc., of which the Employer was an 'indirect subsidiary.' It is possible that this agreement did govern the Employer's conduct during the Respondent's earlier organizing campaign which led to its certification, in 2010, as the exclusive bargaining representative. However, there is no evidence that it governed, affected or even mentioned either who could post notices on the bulletin board or any other term and condition of employment.

(ALJD 4:33-40; *see* GC Exs. 7-8; TR 205-15).

8. The ALJ erred in holding that the Complaint did not allege the existence of a neutrality agreement when he stated that:

> However, is the existence of a 'neutrality agreement' actually alleged in the complaint? As discussed further below under the heading 'The Neutrality Agreement,' neither the complaint nor the amended complaint separately and specifically alleges that a neutrality agreement exists. Rather, both paragraph 8 of the original complaint and paragraph 8(a) of the amended complaint simply assume the existence of such a document by alleging that the Respondent has failed to provide a copy of 'its neutrality agreement'. If the complaint had alleged that a neutrality agreement existed instead of assuming that fact, the Respondent clearly would have been required to admit or deny such a document's existence. However, I have some concerns that the wording of the present complaint did not place the Respondent on notice that it needed to deny the existence of any neutrality agreement.

(ALJD 5:19-30). The ALJ further erred by finding that "the complaint does not separately allege the existence of a neutrality agreement." (ALJD 16:1-14).

9. The ALJ erred in finding the Respondent provided an adequate Answer to Complaint Paragraph 8 when he stated that "the Respondent's answer included sufficient explanation to satisfy the rule. Further, I conclude that the Respondent effectively has denied the allegations raised in paragraph 8 of the complaint, as amended." (ALJD 6:1-3). The ALJ further erred by finding that "Respondent's answer satisfied the Section 102.20 requirement to 'specifically admit, deny, or explain each of the facts alleged in the complaint. . . .'" (ALJD 16:16-28).

10. The ALJ erred in his treatment of the evidence concerning Michael Lamond, an Employer representative who had passed away, by finding and ruling that:

> The Respondent raised a hearsay objection to Zamora's testimony concerning what Lamond told her. Lamond did not testify and the record suggests that he may have died. The Employer is not a party to this proceeding and even if it were, the record does not establish that Lamond was the Employer's agent. Therefore, I did not receive Zamora's testimony concerning Lamond's words for the truth of the matter asserted, and make no findings concerning what Lamond actually said to Zamora during this telephone conversation.

(ALJD 9:9-14). The ALJ further erred in mischaracterizing the statements, desires, and motivation of the Charging Party regarding her conversations with Mr. Lamond. (ALJD 10:5 to 10:33). The ALJ erred in refusing to accept the Charging Party's testimony about Lamond's statements and her reasons for seeking the neutrality agreement, and in ruling that "I won't accept it for the truth of the matter asserted." (TR 87-112, and particularly 98-99, 89:21-22; 107:20-22).

11. The ALJ's credibility determinations regarding Charging Party's testimony were erroneous; he further erred in finding the Charging Party's testimony "vague" and of "diminishe[d] … credibility," (ALJD 9:16 to 10:5), and in repeatedly

mischaracterizing the Charging Party's statements, desires, and motivation. (ALJD 9:16 to 10:11).

12. The ALJ erred in examining, and reflecting negatively upon, the Charging Party's past experience with neutrality agreements, and in probing and speculating upon her "ulterior motives" in bringing this case, her alleged "axes to grind," and her allegedly "seeking to set a precedent for the principle that a union has a duty to disclose neutrality agreements to bargaining unit employees." (ALJD 10:35 to 11:14). The ALJ further erred in his statement that the Charging Party lacked "impartiality" in her testimony. (ALJD 12:32).

13. The ALJ erred in his credibility and evidentiary findings, to wit: that "Zamora's testimony about what Lamond said constitutes hearsay which cannot be used to establish the truth of the matters Lamond asserted. But even apart from being hearsay, Zamora's nebulous testimony would fall short of establishing either that the Employer had entered into a neutrality agreement with the Respondent or that such agreement was the reason why the Employer would not allow her to use the locked bulletin boards." (ALJD 11:15-19).

14. The ALJ erred in speculating, misinterpreting, and then finding that "Zamora thus appears to be claiming that the Employer was treating *individual nurses* in two different ways, depending on their support for or opposition to the Union." (ALJD at 12:9-10; 12:9 to 12:44).

15. The ALJ erred in speculating and then finding that "Respondent's right to post notices on a locked bulletin board was not a condition of employment of any

bargaining unit employee, and it was not a right established by a secret agreement."

(ALJD 13:1-3).

16. The ALJ erred in speculating and then finding:

> It may be noted that Zamora's letter stated as fact some assertions which the present record does not substantiate. For example, no credible evidence indicates that her employment "remains governed by the second, post-organizing stage" of a neutrality agreement. Indeed, the record does not establish that there is a neutrality agreement with two portions, or that one of those "stages" remained in effect at the time of this letter. The credited evidence also does not prove that any agreement other than the collective-bargaining agreement affected the terms and conditions of employment of bargaining unit employees.

(ALJD 13:41 to 14:2).

17. In his discussion about the neutrality agreement, the ALJD erred in how he analyzed this case, and in stating that:

> However, the General Counsel must prove more than that the Respondent did not furnish the Charging Party with a requested document. As a threshold matter, the government first must establish that such a document existed and then must prove that the Respondent, as exclusive bargaining representative, had a duty to provide it to a requesting employee. These predicate conditions—that the document in question actually exists and that the union has a duty to furnish it upon request by a bargaining unit member—cannot simply be assumed to be true. If a bargaining unit employee asks the exclusive bargaining representative for a copy of a document which does not exist, and that union tells the employee that no such document exists, there can be no breach of the duty of fair representation. An exclusive bargaining representative cannot, and does not have to, furnish a nonexistent document. That principle seems so axiomatic it hardly needs to be mentioned. However, in the present case, there are complicating factors which make it advisable to state the obvious: First, the Charging Party's July 11, 2018 request, when read carefully, turns out to be more ambiguous than it initially appears. Second, the complaint does not separately allege that a neutrality agreement exists, but just assumes that fact. Third, the Respondent answered the complaint in such a way that it could not be certain whether or not a document entitled "neutrality agreement" actually existed. These three factors come together to create a muddle, a nearly perfect cyclone of ambiguity.

(ALJD 14:32 to 15:16).

18. Regarding the Charging Party's July 11, 2018 request for information, (Jt. Ex. 3), the ALJ erred by finding ambiguity where there was none, and by misinterpreting and effectively rewriting the Charging Party's specific July 11, 2018 request for any neutrality agreement struck between NNOC and her employer. (ALJD 15:18-44). Charging Party's letter stated: "I am formally requesting a copy of the HCA/NNOC Neutrality Agreement that brought your union into our facility." (ALJD 13:27-30).

19. The ALJ erred by finding that "the Respondent has effectively denied the existence of the document which the Charging Party requested." (ALJD 16:16-28). Further, with regard to the section of the ALJD entitled "The Respondent's Answer" (ALJD 16:17 to 23:17), the ALJ erred in his entire legal and factual analysis of the case, including: a) his failure to discuss and make negative credibility findings on the shifting and blatantly evasive testimony of Union agent Van Waus; b) his failure to properly deal with the "conflict" he recognized, (ALJD 18:31), between Van Waus's testimony and the evidence from the Employer/HCA, (GC Ex. 7), proving the existence of a neutrality agreement that did affect how the Employer could deal with decertification efforts; c) his failure to properly deal with and issue sanctions against NNOC over the refusal of its co-contracting party, HCA, to comply with his order for an *in camera* inspection of the neutrality agreement, (Jt. Ex. 7), which exists by the Employer's own admission, (GC Ex. 7); d) his analysis that NNOC and the Employer/HCA had a right to keep their neutrality agreement secret from the represented employees; e) his "finding" that the neutrality agreement "does not affect the terms and conditions of employment of bargaining unit employees," (ALJD 22:1-2), even though he had never seen the agreement; f) his

criticism of the Charging Party for speculating and not knowing what was in the neutrality agreement, despite its having been kept secret and purposefully withheld from her by NNOC and the Employer/HCA; g) his failure to properly deal with the fact that the neutrality agreement was purposefully withheld by NNOC and the Employer/HCA from an *in camera* ALJ inspection, precisely because it was a secret backroom deal that targeted employees; and h) his refusal to treat the Employer and HCA as a single entity for the purpose of his analysis under the NLRA, and by failing to grasp that being an "indirect subsidiary" does not change the application of the neutrality agreement to the Charging Party's workplace.

20. The ALJ erred in: a) revoking the Charging Party's and the General Counsel's subpoenas *duces tecum* directed to the NNOC unions and in not ordering, at the least, an *in camera* inspection; and b) failing to sanction or make negative inferences against NNOC after its co-contracting partner, HCA, refused to comply with an order for an *in camera* inspection of the material Charging Party subpoenaed. (Jt. Ex. 7). Additionally, under the unique circumstances of this case, the ALJ erred in applying *Electrical Energy Services, Inc.*, 288 NLRB 925 (1988), as a reason for revoking the subpoenas or not insisting on compliance with them. (ALJD 19-20; TR 33-44; 126-42; 218-19).

21. The ALJ erred in relying on legal conclusions contained in the Employer's position statement, (GC Ex. 7), and in NNOC Counsel's oral representations, (TR 138-40), about the neutrality agreement, even though he was correct in relying on the

Employer's position statement to establish that the secret neutrality agreement in fact existed. (ALJD 17-22; more specifically 21:43-22:3).

22. The ALJ erred in finding that "the Respondent . . . had some legitimate interest in keeping the [neutrality] document secret." (ALJD 20:17-19).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 2, 2020, a true and correct copy of the Charging Party's Exceptions was filed with the NLRB Executive Secretary using the NLRB e-filing system, and was also served via e-mail on that same date to:

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